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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. GEORGE LLEWELLYN TAYLOR-WINDSOR, Defendant and Appellant.	F076010 (Super. Ct. No. SCR016024) **OPINION**

APPEAL from a judgment of the Superior Court of Madera County. Charles A. Wieland, Judge. (Retired Judge of the Madera County Sup. Ct. assigned by the Chief Justice pursuant to article VI, § 6 of the Cal. Const.)

Victor J. Morse, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Louis M. Vasquez, Amanda D. Cary and Lewis A. Martinez, Deputy Attorneys General, for Plaintiff and Respondent.

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Appellant George Llewellyn Taylor-Windsor set out with three recent acquaintances to drive to a nearby casino. An altercation erupted, during which Taylor-

Windsor stabbed the driver of the vehicle and one of the passengers multiple times. The passenger died of her injuries; the driver was injured, but survived. A jury rejected Taylor-Windsor's claim of self-defense and convicted him of first degree murder (Pen. Code, § 187, subd. (a); count 1) and attempted second degree murder (Pen. Code, §§ 187, subd. (a), 664; count 2), with enhancements for the personal use of a deadly or dangerous weapon (Pen. Code, § 12022, subd. (b)(1)), and a great bodily injury enhancement to count 2 (Pen. Code, § 12022.7, subd. (a)). He was sentenced to an aggregate term of 39 years to life.

On appeal, Taylor-Windsor claims the trial court prejudicially erred in (1) barring defense counsel from cross-examining the driver of the vehicle regarding a felony conviction that prevented him from lawfully possessing a firearm; (2) refusing to strike testimony that Taylor-Windsor once stated he would kill his ex-wife if he could; (3) permitting testimony that Taylor-Windsor once threatened to kill his wife during a phone call with her; and (4) refusing to instruct the jury on provocation and heat of passion as a basis for conviction of voluntary manslaughter and attempted voluntary manslaughter as lesser included offenses. He also contends counsel was ineffective in failing to request the jury be instructed with CALCRIM No. 522 concerning the reduction of first degree murder to second degree murder based on provocation. Finally, he contends there was insufficient evidence of premeditation and deliberation to support his conviction for first degree murder. He contends these errors were prejudicial, both individually and cumulatively.

We reject his contentions and affirm the judgment.

FACTUAL BACKGROUND

In September 2016,[1] Taylor-Windsor traveled from Wyoming to California by bus to find work following contentious divorce proceedings. He spent the next two months

[1] All references to dates are to dates in 2016 unless otherwise stated.

working odd jobs and sleeping on his friend's couch or in hotels, essentially living out of his car.

On or around November 13, Taylor-Windsor met Mike R.[2] in a hotel parking lot. Mike offered to help Taylor-Windsor get work with his employer in the Bass Lake area. Mike and Taylor-Windsor went to the casino that night and the next night. Taylor-Windsor then stayed with Mike in a cabin rented by Mike's employer. Also staying in the cabin was Reid K., who was seeking employment with Mike's employer, and Reid's girlfriend Jessica N.

On November 15, Mike, Reid, Jessica, Taylor-Windsor, and Mike's boss spent time at the cabin. Taylor-Windsor and others were smoking marijuana, and Taylor-Windsor had several drinks. Eventually, Mike proposed going to the casino to gamble. Reid drove his truck, with Jessica in the middle of the front bench seat and Mike in the front passenger seat. Taylor-Windsor rode in the back seat. At approximately 11:00 p.m., while still in the moving truck, Taylor-Windsor suddenly stabbed Reid and Jessica multiple times.[3]

Mike jumped out of the moving truck and fled. The truck then collided with a rock wall and came to a stop, blocking exit from the passenger side. Reid and Taylor-Windsor exited the driver's side of the vehicle and wrestled briefly. Taylor-Windsor then ran down the highway, over a guardrail, and down an embankment. He proceeded to a nearby residence where he threw his knife on the front porch and banged on the door. He told the residents of the home someone was trying to kill him and he asked to be let in. The residents refused to let him in but told him they would call 911. He remained there

[2] To preserve the privacy of the victims and witnesses, we refer to them by their first names. No disrespect is intended.

[3] The events precipitating the stabbing were disputed at trial. Differing accounts by Reid, Mike, and Taylor-Windsor are discussed below.

two to three minutes, trying to get in, until the male resident pointed a gun at him and told him to leave.

Taylor-Windsor went up an embankment and ran to another house. He banged on the door but no one answered. He entered through an unlocked door and found no one inside. He rummaged briefly through the house before leaving.

Leaving the second residence, Taylor-Windsor spotted a police vehicle that was responding to the 911 call from the first residence and he flagged it down. He asked for help and told the officer he had been stabbed with a syringe. The officer did not see a puncture wound or bleeding. Taylor-Windsor was cleared by medical personnel and taken to the sheriff's substation. There, he told a detective and a paramedic he was stabbed with a syringe, but no injection mark, abrasion, or discoloration was seen.

Meanwhile, law enforcement personnel arrived at the scene of the collision and found Jessica dead in the front passenger seat of the truck. Reid had multiple stab wounds and was taken to the hospital. Ultimately, Jessica was determined to have died from at least 15 separate knife thrusts, some of which penetrated five to six inches deep. Reid had multiple stab wounds to the left side of his chest, near his neck, and on his left shoulder, which resulted in a collapsed lung, fractured rib, and injured diaphragm and liver.

Reid's Testimony

Reid and Jessica arrived in Bass Lake the day before the stabbing. They also met Taylor-Windsor and Mike that day.

While at the cabin on the night of the stabbing, Reid conversed with Taylor-Windsor. They discussed Taylor-Windsor's vintage car and Reid estimated Taylor-Windsor could get four to five thousand dollars for it. Taylor-Windsor also stated he was unhappy with his ex-wife in Wyoming and "if he could, he would have killed her."

Mike proposed they go to the casino and Reid agreed on the condition Mike would provide some gas money. Before leaving, Reid and Jessica ingested methamphetamine

provided by Mike. Reid first drove the group to a gas station but he couldn't get his debit card to work. They left the station and Reid "rubbed" his truck against a soda machine on the way out. Mike assured Reid he would pay for gas at a gas station on the way. Reid was stressed about running low on gas, the possibility of getting arrested for driving on a suspended license, and uncertainty about his work prospects. The methamphetamine made him feel "[o]verly cautious, overly wary, and stressed."

Reid heard Taylor-Windsor leave a voice message for his ex-wife and he sounded sad. Reid repeatedly asked Taylor-Windsor to turn off or reduce the light from his cell phone because it was interfering with Reid's driving; Taylor-Windsor did not comply or respond. At one point, Taylor-Windsor asked, "What would you say to your son in your last e-mail to him?" and Reid responded, "Tell him you love him and that you'll be there to see him as soon as you can."

Minutes later, a commotion like "somebody that was being attacked by a swarm of bees" or "shocked by electricity" came from the backseat. Reid thought Taylor-Windsor was striking Mike, then saw he was striking Jessica, and Taylor-Windsor then turned to strike Reid. Taylor-Windsor had his back against the roof of the truck and was coming down on them. Reid soon realized Taylor-Windsor was stabbing them with a knife. Jessica remained facing forward. Reid hit the brakes but the truck collided with a rock wall and came to a stop. Reid noticed Mike was gone. Taylor-Windsor was still striking Reid and Jessica. Jessica wasn't moving. Reid attempted to fight back by throwing his elbow over the back seat. Reid opened his door and was struck a few times in his right arm and rib area in the process. He opened the rear driver's side door and Taylor-Windsor exited the truck.[4] Reid and Taylor-Windsor struggled and went to the ground,

[4] The rear driver's side door could not be opened without first opening the front driver's side door.

then Taylor-Windsor fled down the highway. Reid heard Mike yell, "What happened?" He could not see Mike (and, in fact, never saw him again).

Reid returned to the truck. Jessica was unconscious. A car stopped and Reid asked the driver to call 911. Another person got out of his car and talked to Reid. During that time, a phone rang and the name "Mandy" appeared on the screen. "Mandy" is the name of Taylor-Windsor's ex-wife. Reid answered the phone and told the woman who answered that Taylor-Windsor stabbed him and his friend and they were hurt and couldn't get through to 911.

Reid was convicted in 2009 of felony transportation of a stolen firearm and felony possession of a stolen firearm. However, Reid testified he did not bring a gun or ammunition with him to Bass Lake. He did not see any of his companions with a gun and did not know of any gun in his truck. Reid denied that anyone threatened Taylor-Windsor with a gun or a syringe. He knew Jessica was an intravenous drug user.

Mike's Testimony

Mike met Reid, Jessica, and Taylor-Windsor one or two days before the incident. When he met Taylor-Windsor in the hotel parking lot, Taylor-Windsor stated he was out of work and needed a place to stay soon. Mike offered to help Taylor-Windsor get work. That night, he and Taylor-Windsor went to a casino and gambled, and Taylor-Windsor lost all his money. Taylor-Windsor told Mike the mother of his child was refusing to talk to him. They went to the casino again the following night.

At some point, Mike, Reid, Jessica, and Taylor-Windsor ended up staying together at a cabin in Bass Lake rented by Mike's employer. On the night of the stabbing, they were all at the cabin with Mike's boss. "Pretty much everybody" except for Mike had been smoking marijuana all day. Although Mike did not see Taylor-Windsor drinking, at some point, Taylor-Windsor gave Mike his car keys because he felt he had drunk too much to drive.

Mike proposed going to the casino to gamble. Reid agreed after Mike offered him gas money. They stopped for gas and Mike offered Reid money, but the station did not take cash. Reid paid with a card. When Reid got back in the car, he and Jessica argued and Reid hit a soda machine with his truck while exiting the station. They then continued toward the casino.

During the drive, Taylor-Windsor stated he wanted to leave the area because work wasn't panning out but Mike reassured him work would resume in a day or two. Taylor-Windsor also tried to call the mother of his child. Taylor-Windsor told Mike he spoke with her earlier and she told him to call back, but then wasn't answering her phone. Mike testified Taylor-Windsor was acting "very sketchy," angry, paranoid, and making contradictory statements.

At one point, the cab of the truck lit up and Reid told Taylor-Windsor to turn off the light on his phone. Then Taylor-Windsor "just started swinging" his right hand in an overhand, half circular motion at Jessica. Mike could not see anything in Taylor-Windsor's hand. Taylor-Windsor struck Jessica multiple times as she screamed. Taylor-Windsor's face was "blank, like there was nobody home, nothing was there."

The truck started to swerve and Mike jumped out of the truck before it "ran into the side of the mountain." He saw someone in the truck was still swinging and he ran back toward the truck. Both driver's side doors came open and Taylor-Windsor took off running. Reid was leaning on the outside of the truck, screaming for help. Mike tried to use his phone but had no service. He flagged down a car and told the driver to call 911. Mike then left the scene and hitchhiked back to the cabin.

Mike acknowledged he initially told law enforcement he left the group at the gas station, but testified this statement was untrue. He also acknowledged he told law enforcement that he saw Jessica during the drive with something that could have been a gun that she tucked beneath her; however, on further reflection he thought it could have

been a cell phone or that she was buckling her seat belt. He testified he did not actually see Jessica with a gun.

At the time of trial, Mike was in custody for felony charges arising out of Florida. He also has several prior felony convictions.

Other Eyewitnesses

One driver approached the scene and saw a truck on the side of the road, a man vaulting over a guardrail on the side of the highway, a man in front of the truck, and another man in the middle of the road who stopped him and said, "Get help, we've been attacked." He also saw hands hanging out of the driver's side of the truck. He was on the scene for somewhere between 20 seconds and four minutes before he left and called 911.

Another driver approached the scene from the opposite direction. He pulled past the truck and saw the doors open and someone in the truck. He did not see anyone outside the truck. He pulled alongside another car that was stopped behind the truck and asked what was going on. The other driver "said something about a stabbing, something about there being another person, and that they couldn't get ahold of the authorities and that they were going to go down to town to get help." The first driver left and the second driver tried to call 911 but couldn't get through.

The second driver got out of his car and approached the truck, where he saw Reid in the driver's seat and a woman who appeared to be unconscious in the center seat. Reid said he had been stabbed by one of his coworkers. This witness waited 10 to 15 minutes for authorities to arrive. During that time, Reid didn't leave the truck. A cell phone on the dashboard rang and indicated the caller was "Mandy." The witness asked whether the caller was Reid's family and Reid responded, "No, that's the person's wife that was the person that stabbed me." Reid also said the person who stabbed him had problems at home and "started to get emotional in the car and that's when he started to freak out and do what he did."

Law Enforcement Investigation

A sheriff's sergeant searched the area uphill and downhill from the truck, the roadway north and south, and the embankment where Taylor-Windsor fled, and did not find anything out of the ordinary.

A detective encountered Mike back at the cabin at approximately 3:00 a.m. on the morning following the stabbing. Mike told the detective Reid and Jessica were fishing through her backpack and took something from it that she put under her and sat on. Mike thought, based on her body movements, that the object was a gun, but he reported he did not actually see a gun.

Jessica had two knives in sheaths on her belt and an orange capped hypodermic needle in her jacket pocket. She had needle tracks on both of her forearms that were crusted over and bruised.

No guns or ammunition were found inside the truck or in the truck bed. Three knives were inside the truck: one "throwing" knife on the passenger front floorboard, one machete in a sheath on the back floorboard, and one knife in a sheath in a black nylon bag on the back floorboard. A plastic pencil box inside the truck contained narcotics paraphernalia, including seven capped syringes. Another capped syringe was found on the rear floorboard on the passenger side.

Other Witnesses for the People

Taylor-Windsor's romantic friend testified that Taylor-Windsor described his ex-wife as crazy and stated she just wanted his money.

Taylor-Windsor's ex-wife, Mandy, testified they married in July 2013 and divorced in April or May of 2015, with the divorce being final in August 2015. Mandy had custody of their son. In the months before the stabbing, Taylor-Windsor told Mandy he was having trouble finding reliable work in California. On the night of the stabbing, Taylor-Windsor called but Mandy was doing homework and told him she couldn't talk. He was annoyed and she agreed to call him back when she was done. He called back

several times but she didn't answer. She called him back around 11:00 p.m. but another man answered the phone. The man said "[h]e was hurt and that [Taylor-Windsor] stabbed some people …."

Taylor-Windsor's Testimony

Taylor-Windsor testified in his own defense.

On the day of the incident, Reid and Jessica were acting "shady" and "skittish." Taylor-Windsor consumed three to four mixed drinks over the course of the afternoon but was not drunk. He and Jessica were also smoking marijuana.

Taylor-Windsor was concerned he wouldn't get a job. He told Mike he was going to leave but, somewhere between 7:00 p.m. and 9:00 p.m., Mike took his keys and encouraged Taylor-Windsor to stay, saying "No, you know, you've been drinking a little bit." Mike said they were thinking of going to the casino and Taylor-Windsor agreed to hang out for a little while to sober up. Taylor-Windsor and Reid discussed Taylor-Windsor's car and Reid said he thought the car was worth four to five thousand dollars. Taylor-Windsor denied discussing his ex-wife or stating he would have killed her. While at the cabin, Taylor-Windsor called his ex-wife but she said she was busy and to call back in about an hour. On the drive, he called his ex-wife once or twice.

When they left the cabin, they went to a gas station but neither Reid nor Mike had money for gas. Taylor-Windsor refused to pay for gas for Reid's truck. They proceeded toward Oakhurst. There was a lot of stuff in the vehicle. Jessica pulled a backpack from the backseat area up to the front seat. The radio was loud and Reid, Jessica, and Mike were mumbling to each other. Taylor-Windsor tried calling his ex-wife again. She didn't answer, but Taylor-Windsor didn't find that upsetting. Reid told him to get off his phone. Mike was playing around with his phone the whole time. Jessica was playing with a syringe, flicking it like a cigarette. Taylor-Windsor could not see whether the syringe was capped.

At some point, "[t]hey" started whispering to each other, and Taylor-Windsor heard them say something like, "We're not going to be able to do it up here," and "I could pull over up here." Mike said, "Hold on" and was texting. Taylor-Windsor said, "Hold on for what?" but Mike said not to worry about it. Jessica said, "Here, take this" or "Here's this" and fumbled around as if pulling something from between her legs or under her seat. She handed something to Reid and Reid looked back at Taylor-Windsor and pointed a gun at him with his right hand. Reid was still driving as he did this. Taylor-Windsor swatted the gun away.

Jessica turned around and started hitting Taylor-Windsor. Taylor-Windsor felt a sharp pain in his side. He believed she still had the syringe in her hand. He also knew she had knives on her because he saw her put two knives on her belt and a pair of bolt cutters in her vest as they were leaving the cabin. Taylor-Windsor was scared and pulled his knife out and started stabbing. Taylor-Windsor tried to open his door but couldn't without opening the front driver's door. He shoved Reid forward and popped open his door as the vehicle was coming to a stop. He then opened the back door of the truck and tried to run away. Reid grabbed him and they stumbled and hit the ground. Taylor-Windsor swung at Reid with the knife and then took off running.

Taylor-Windsor jumped over a guardrail and went down a steep embankment. He went to a house and spoke with the residents, who told him they called the police. The man pointed a gun at him and told him to leave. He saw another light and started running toward a different house. When no one answered the door, he turned the handle and went inside. He looked for a phone but didn't find one. He went looking for another house but noticed a police car and flagged it down.

Taylor-Windsor acknowledged that he called his ex-wife in April 2015 and threatened to kill her. He also acknowledged he might have told his father that an old friend named AJ may have had something to do with the stabbing. He denied using methamphetamine on the date of the stabbing. The night of the stabbing, he had no

money, wasn't wearing any jewelry, and the only valuable he had on his person was a credit card tied to his bank account.

DISCUSSION

I. Evidence of Reid's Motive to Dispose of an Alleged Gun

Taylor-Windsor contends the court prejudicially erred in prohibiting cross-examination of Reid regarding his inability to lawfully possess a gun. He contends the error also deprived him of his constitutional rights to confrontation, due process, to present a complete defense, and to compulsory process.[5] Even if this evidence was erroneously excluded, we conclude its admission was harmless beyond a reasonable doubt.

A. Relevant Factual Background

Outside the presence of the jury, the court determined evidence Reid was convicted in 2009 of felony possession of a stolen firearm and felony transportation of a stolen firearm was admissible to impeach Reid's credibility. Defense counsel argued the convictions could also be used to prove Reid was prohibited from possessing a firearm based on his status as a felon and therefore had a motive to hide a firearm on the night of the stabbing. The People pointed out they were precluded from bringing in certain motive evidence as to the defendant and asked the evidence against Reid be excluded pursuant to Evidence Code section 352.[6] The court determined permitting the defense to cross-examine Reid regarding the terms of his probation or sentence would exceed the questioning permissible for impeachment purposes. Additionally, the court determined

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[5] Taylor-Windsor does not elaborate on how the rulings violated his constitutional rights. We note the Sixth Amendment right to compulsory process is generally invoked in the face of misconduct by the prosecutor that deprives a defendant of a defense witness's testimony that is material to the defense. (*People v. Jacinto* (2010) 49 Cal.4th 263, 268-270.) Taylor-Windsor's claim of evidentiary error does not demonstrate a violation of this right.

[6] Undesignated statutory references are to the Evidence Code.

the door had not been opened to further questioning regarding Reid's sentence and such questioning would not be "appropriate." The court ruled Reid could be questioned only regarding "the name of the felony, the general nature or elements of the felony, which were basically unlawful possession of a stolen firearm and transportation of that firearm, with a conviction of both on February 11, 2009, in San Francisco, end of story."

Reid was questioned regarding his felonies on direct examination by the People. At that time, the court instructed the jury with CALCRIM No. 316, that this evidence could be considered only in evaluating Reid's credibility.

In closing, the People pointed out no gun was found in the truck. The defense emphasized Mike initially told law enforcement he thought he saw Jessica and Reid in possession of a gun, and Taylor-Windsor claimed Reid pointed a gun at him. The defense therefore argued Reid "got rid of" the gun while he was "walking around the scene" or alternatively that Mike might have taken it and gotten rid of it. The People again noted on rebuttal that no gun was found and argued the gun did not exist.

B. Legal Standards

Evidence that a person committed a crime is admissible to prove motive. (§ 1101, subd. (b); see *People v. Letner and Tobin* (2010) 50 Cal.4th 99, 190-191 [evidence of other crimes admissible to show motive for flight].) However, such evidence is inadmissible under section 352 if the court determines "its probative value is substantially outweighed by the possibility that it will consume an undue amount of time or create a substantial danger of undue prejudice, confusion of issues, or misleading the jury." (*People v. Hoover* (2000) 77 Cal.App.4th 1020, 1028-1029.) A trial court's ruling under sections 352 and 1101 is reviewed for abuse of discretion. (*People v. Clark* (2016) 63 Cal.4th 522, 586 (*Clark*); *People v. Memro* (1995) 11 Cal.4th 786, 864.) We review state law evidentiary error for prejudice under the standard set forth in *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*).

Application of the ordinary rules of evidence does not generally violate a criminal defendant's federal constitutional rights. (*People v. Lawley* (2002) 27 Cal.4th 102, 155.) Trial judges retain wide latitude "to impose reasonable limits on … cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 679.) Exclusion of evidence on the ground its "probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury" does not violate the Constitution. (*Holmes v. South Carolina* (2006) 547 U.S. 319, 326-327.)

An evidentiary ruling does not violate due process unless it offends " 'some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.' " (*People v. Fitch* (1997) 55 Cal.App.4th 172, 178-179.) The confrontation clause is not violated by a trial court's reasonable limitations on inquiries that are confusing, prejudicial, or only marginally relevant. (*People v. Williams* (2016) 1 Cal.5th 1166, 1192; *People v. Linton* (2013) 56 Cal.4th 1146, 1188.) The constitutional right to present a defense does not include the right to present inadmissible evidence. (*People v. Cudjo* (1993) 6 Cal.4th 585, 611; see *People v. Ayala* (2000) 23 Cal.4th 225, 269.)

Federal constitutional errors are reviewed under the harmless error standard set forth in *Chapman v. California* (1967) 386 U.S. 18 (*Chapman*). Under *Chapman*, "[w]e must determine whether it is clear beyond a reasonable doubt that a rational jury would have rendered the same verdict absent the error." (*People v. Merritt* (2017) 2 Cal.5th 819, 831 (*Merritt*).)

C. Analysis

The trial court ruled cross-examination regarding Reid's inability to lawfully possess a gun would not be "appropriate." From this ruling, we cannot determine whether the trial court concluded this evidence did not constitute proper motive evidence

under section 1101, subdivision (b), or whether the trial court excluded the evidence pursuant to section 352.

Regardless, however, exclusion of this evidence was harmless beyond a reasonable doubt. The evidence had only minimal probative value. While evidence of Reid's inability to lawfully possess a firearm would have informed the jury he had a motive to hide a firearm to avoid legal repercussions, the jury already was presented with a powerful theory of motive. Under Taylor-Windsor's version of the events, Reid pointed a firearm at him without provocation and, in response, Taylor-Windsor fatally stabbed Jessica and severely injured Reid. These events, if accepted as true, could have provided a motive for Reid to dispose of the gun, irrespective of whether his possession of the gun was lawful. Evidence that Reid was prohibited from possessing a firearm added little to the jury's evaluation of his motive.

Furthermore, evidence of a gun on the scene was comprised almost entirely of Taylor-Windsor's testimony. Mike testified he did not see a gun, only something that could have been a gun, but upon reflection might have been a cell phone or seat belt. Moreover, no gun or ammunition was found on the scene and the testimony suggested Reid had no opportunity to dispose of a gun elsewhere. Testimony from uninvolved eyewitnesses indicates one witness or another was present from the time of Taylor-Windsor's flight to the arrival of law enforcement. During that time, Reid did not stray any distance from the truck due to his severe injuries. Law enforcement searched the surrounding area and did not find a gun.

Based on the strength of the evidence against Taylor-Windsor and the minimal probative value of the contested evidence, we conclude a rational jury would have reached the same result, even if faced with evidence Reid was prohibited from possessing a firearm. Thus, even if error, the exclusion of this evidence was harmless beyond a reasonable doubt.

II. Taylor-Windsor's Statement Regarding his Ex-Wife

Taylor-Windsor contends the trial court abused its discretion in refusing to strike Reid's testimony regarding a statement Taylor-Windsor made about wanting to kill his ex-wife. Taylor-Windsor contends this testimony was irrelevant, unduly prejudicial, and constituted improper character evidence. He also contends admission of this statement violated his constitutional right to be convicted only upon reliable evidence. We find no abuse of discretion.

A. Additional Factual Background

Reid testified that, while at the cabin prior to departing for the casino, Taylor-Windsor stated, regarding his ex-wife, "if he could, he would have killed her." Defense counsel did not lodge a contemporaneous objection but soon thereafter the parties held discussions off the record. Subsequently, defense counsel memorialized an objection to this testimony on the ground the statement was not previously discovered,[7] constituted improper character evidence, and should be excluded pursuant to section 352; he asked the testimony be stricken. The prosecutor represented he was unaware Reid would make this statement but argued the statement showed Taylor-Windsor's hatred for his ex-wife, which was relevant to the prosecutor's theory of motive for the offense. The court refused to strike the testimony, finding there was nothing to indicate the prosecutor knew Reid would so testify, and the evidence was "in line" with other admissible evidence concerning Taylor-Windsor's dissatisfaction regarding his communications with his ex-wife regarding their son. Reid later testified he could not recall whether he ever mentioned this comment to anyone prior to trial but that he believed he had done so.

The prosecutor explained his theory of motive in closing argument: Taylor-Windsor was down on his luck and struggling to find work and lodging while in

[7] Defense counsel later retracted his accusation the prosecutor had committed misconduct.

California. On the night of the incident, he was drinking and smoking marijuana and his ex-wife, with whom he had a contentious divorce, refused to speak with him when he called. During the drive to the casino, he tried to call her again and, when she did not pick up, his demeanor changed. The People cast Taylor-Windsor as a "broken, angry man" who lashed out:

> "Maybe it was [his ex-wife], maybe it was his gal – gambling problems, California failures, being broke, who knows. Maybe it was as simple as Reid telling him to dim the light on the phone. Maybe he was mad that he was around the weird people. Maybe it was something else or a combination. Whatever it was, on November 15th, 2016, in that truck nearing 11:00 o'clock at night , the defendant snapped and went on an intentional killing rage."

B. Legal Standards

Relevant evidence is "evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (§ 210.) Relevant evidence is admissible, unless otherwise provided by statute. (§§ 350, 351.) Evidence of prior conduct is generally inadmissible to prove conduct on another specified occasion or to prove a person's disposition to commit such an act. (§ 1101, subd. (a).) However, such evidence may be admissible to prove motive. (§ 1101, subd. (b).)

We review the trial court's evidentiary rulings for abuse of discretion. (*People v. Daveggio & Michaud* (2018) 4 Cal.5th 790, 824; *People v. Panah* (2005) 35 Cal.4th 395, 474.)

C. Analysis

Evidence that Taylor-Windsor made a statement regarding killing his ex-wife in the hours before the murder was relevant to the People's theory of motive. The evidence has some tendency in reason to prove Taylor-Windsor may have "snapped" when his ex-wife declined to answer his call. (See § 210.) The court did not abuse its discretion in concluding the evidence was relevant and admissible for this purpose, even if the same

evidence was inadmissible for the purpose of demonstrating Taylor-Windsor acted in conformity with a bad character trait, such as a predisposition toward violence. (See § 1101, subd. (a).)

Furthermore, the prejudicial effect of the statement was minimal. Taylor-Windsor's ex-wife lived out of state and there was no evidence or argument to suggest he had any actual intent or ability to physically harm her at the time the statement was made. Nor was the statement particularly graphic or inflammatory when compared to the conduct at issue in this case. The court did not abuse its discretion in concluding the probative value of the statement outweighed any prejudicial effect. (*People v. Eubanks* (2011) 53 Cal.4th 110, 144 [risk of undue prejudice is decreased when testimony describing the defendant's other acts is " 'no stronger and no more inflammatory than the testimony concerning the charged offenses.' "]

We also reject the argument this evidence violated Taylor-Windsor's right to due process. "[T]he admission of evidence, even if erroneous under state law, results in a due process violation only if it makes the trial *fundamentally unfair*." (*People v. Partida* (2005) 37 Cal.4th 428, 439.) Here, the evidence was not erroneously admitted and it did not render the trial fundamentally unfair.

III. Threat to Ex-Wife and Related Conviction

Taylor-Windsor challenges the admissibility of testimony that he once threatened to kill his ex-wife. Although he appears to concede he could be impeached by the resulting misdemeanor conviction, he contends the court should have sanitized the conviction to reduce the potential for prejudice from evidence of the underlying conduct. He contends the evidence deprived him of his due process right to a fundamentally fair trial.

A. Additional Factual Background

During motions in limine, the defense sought to limit, and the People sought to admit, evidence that Taylor-Windsor threatened to kill his ex-wife in a phone call with

her, which conduct resulted in a misdemeanor conviction. The court deferred ruling pending a section 402 hearing.

At the hearing, Taylor-Windsor's ex-wife testified that, in 2015, during the course of their divorce proceedings, Taylor-Windsor called her while he was intoxicated and threatened to come to her house and kill her. He was convicted in Wyoming in relation to this conduct for making a threatening phone call.

The court ruled Taylor-Windsor could be impeached with the conduct underlying the offense, i.e., the phone call in which he threatened to kill his ex-wife.[8] Accordingly, on direct examination, Taylor-Windsor testified that he had a phone conversation with his ex-wife in April 2015 in which he threatened to kill her. The court then instructed the jury this conduct could only be considered for evaluating the credibility of Taylor-Windsor's testimony.

B. Analysis

Misdemeanor convictions are not admissible for impeachment. (*People v. Chatman* (2006) 38 Cal.4th 344, 373 (*Chatman*); compare § 788 [permitting impeachment with felony convictions].) Thus, the court could not have "sanitizied" the underlying conduct by permitting the prosecutor to impeach Taylor-Windsor with the related misdemeanor conviction. (*People v. Wheeler* (1992) 4 Cal.4th 284, 297-300 (*Wheeler*).)

However, a defendant may be impeached by conduct involving moral turpitude. (*People v. Robinson* (2015) 37 Cal.4th 592, 626; *Wheeler, supra,* 4 Cal.4th at 295 ["Misconduct involving moral turpitude may suggest a willingness to lie."]; *People v. Cadogan* (2009) 173 Cal.App.4th 1502, 1507.) Thus, evidence of the conduct underlying a misdemeanor conviction may be admissible, subject to the court's discretion.

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[8] The court did not permit the prosecution to use this evidence for purposes of demonstrating Taylor-Windsor's motive to commit the instant offense because the misdemeanor conduct was too attenuated.

(*Chatman, supra,* 38 Cal.4th at p. 373.) Here, Taylor-Windsor does not contest the court's determination that the threat to kill his ex-wife exhibited a "general readiness to do evil" and thus qualified as a crime of moral turpitude from which a willingness to lie can be inferred. (See *People v. Chavez* (2000) 84 Cal.App.4th 25, 28.)

Rather, Taylor-Windsor contends the court abused its discretion in concluding the probative value of this statement was outweighed by its prejudicial effect. However, the court's discretion in this regard is broad. (See, e.g., *Chatman, supra,* 38 Cal.4th at p. 374; see also *People v. Clark* (2011) 52 Cal.4th 856, 932 ["Because the court's discretion to admit or exclude impeachment evidence 'is as broad as necessary to deal with the great variety of factual situations in which the issue arises' [citation], a reviewing court ordinarily will uphold the trial court's exercise of discretion."].) The trial court must consider whether the conduct relates to the witness's veracity, whether it is remote in time, whether it involves conduct similar to the offense charged, and what effect its admission would have on the defendant's decision to testify. (*People v. Clark, supra,* 52 Cal.4th at p. 931.) Taylor-Windsor does not present, and we do not find, any basis to conclude these factors warrant exclusion of his threatening statement in this case.

Furthermore, Taylor-Windsor contends the trial court should have sanitized the conduct by "ordering that it be referred to as conduct amounting to a misdemeanor involving moral turpitude." However, even if sanitizing the conduct in this way was proper, we are unconvinced this reference would have been less prejudicial than permitting the jury to hear Taylor-Windsor uttered a telephonic threat during the course of a contentious divorce. Taylor-Windsor's proposal leaves to the jury's imagination the nature of his morally deficient conduct. In contrast, the actual conduct testified to was not highly prejudicial, particularly in light of testimony from Taylor-Windsor's ex-wife that the former couple nonetheless remained in regular, though limited, communication at the time of the stabbing.

We find no abuse of discretion or constitutional violation.

IV. Voluntary Manslaughter and Attempted Voluntary Manslaughter Theory

Taylor-Windsor contends the court prejudicially erred in failing to give a jury instruction on provocation and heat of passion as a basis for convicting him of voluntary manslaughter and attempted voluntary manslaughter as lesser included offenses to murder and attempted murder, respectively. He argues his testimony that he committed the stabbing only after Reid pointed a gun at him, Jessica stabbed him with a syringe, and both of them hit him, was sufficient to support a jury finding he acted based on provocation and the heat of passion, rather than with malice.

Murder is an unlawful killing with malice aforethought. (Pen. Code, § 187, subd. (a); *People v. Breverman* (1998) 19 Cal.4th 142, 153 (*Breverman*).) An intentional, unlawful killing without malice is voluntary manslaughter. (Pen. Code, § 192; *Breverman, supra,* at p. 153.) Voluntary manslaughter is a lesser included offense of murder. (*People v. Thomas* (2012) 53 Cal.4th 771, 813.) "Under California law, trial courts must instruct the jury on lesser included offenses of the charged crime if substantial evidence supports the conclusion that the defendant committed the lesser included offense and not the greater offense." (*People v. Gonzalez* (2018) 5 Cal.5th 186, 196.)

Heat of passion is one way an intentional, unlawful killing may be reduced from murder to voluntary manslaughter, because it negates the element of malice. (*Breverman, supra,* 19 Cal.4th at p. 154.) Heat of passion voluntary manslaughter has both an objective and a subjective component. (*People v. Moye* (2009) 47 Cal.4th 537, 549 (*Moye*).) The objective prong requires provocative conduct by the victim that would "cause an ordinary person of average disposition to act rashly or without due deliberation and reflection." (*Id.* at pp. 549-550.) The subjective prong requires a finding the accused killed while under " 'the actual influence of a strong passion' " induced by such provocation. (*Id.* at p. 550.)

Our Supreme Court has rejected the contention that an instruction on this theory of voluntary manslaughter is required in "every case in which the *only* evidence of unreasonable self-defense is the circumstance that a defendant is attacked and consequently fears for his life." (*Moye, supra,* 47 Cal.4th at p. 555.) The two leading cases on the intersection of self-defense and heat of passion are *Breverman* and *Moye.* In *Breverman*, "a sizeable group of young men, armed with dangerous weapons and harboring a specific hostile intent, trespassed upon domestic property occupied by defendant and acted in a menacing manner." (*Breverman*, *supra*, 19 Cal.4th at p. 163.) The mob damaged the defendant's car and caused fear and panic at the defendant's residence. (*Id.* at pp. 150-151, 163.) Our Supreme Court determined a reasonable jury could find the defendant's passions were aroused by legally sufficient provocation when he fired upon the mob, killing one individual. (*Id.* at pp. 150-151, 163-164.)

In *Moye*, the defendant chased and eventually caught up with his victim. (*Moye, supra,* 47 Cal.4th at p. 552.) However, the victim turned on the defendant and "with a smirk on his face stated, 'Yeah, now I got you,' " as he attacked the defendant with a bat. (*Ibid.*) The defendant grabbed the bat from the victim and testified that he met each advance by the victim "with a defensive swing of the bat until the victim fell to the ground and could attack him no longer." (*Ibid.*) Our Supreme Court held the trial court was not required to disregard the defendant's own testimony that his actions were defensive; therefore, the trial court did not need to instruct the jury to consider whether the defendant acted in the heat of passion. (*Id.* at pp. 554-555.)

Moye presents the more apt analogy to this case. (*Moye, supra,* 47 Cal.4th at pp. 554-555.) Taylor-Windsor testified that he was scared and believed he would be killed when he initiated the stabbing. The thrust of his entire case was that he acted in self-defense. The trial court was not required to disregard Taylor-Windsor's testimony to instruct the jury to also consider voluntary manslaughter based on a heat of passion theory.

Moreover, even if the trial court was required to give the instruction, its omission was harmless beyond a reasonable doubt.[9] "[I]n some circumstances it is possible to determine that although an instruction on a lesser included offense was erroneously omitted, the factual question posed by the omitted instruction was necessarily resolved adversely to the defendant under other, properly given instructions. In such cases the issue should not be deemed to have been removed from the jury's consideration since it has been resolved in another context, and there can be no prejudice to the defendant since the evidence that would support a finding that only the lesser offense was committed has been rejected by the jury." (*People v. Sedeno* (1974) 10 Cal.3d 703, 721, disapproved on other grounds in *Breverman, supra,* 19 Cal.4th at p. 165; *People v. Wright* (2006) 40 Cal.4th 81, 98.) In other words, "[e]rror in failing to instruct the jury on a lesser included offense is harmless when the jury necessarily decides the factual questions posed by the omitted instructions adversely to [the] defendant under other properly given instructions." (*People v. Lewis* (2001) 25 Cal.4th 610, 646.)

Here, the jury was instructed on complete self defense and the lesser offense of voluntary manslaughter based on imperfect self defense. The jury necessarily rejected both claims when it found Taylor-Windsor guilty of first degree murder and second degree attempted murder. On the facts of this case, a reasonable jury could not have rejected Taylor-Windsor's claim of self-defense – based as it was on being assaulted with a firearm and attacked by Reid and Jessica in a vehicle from which it was difficult to

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[9] There is some question whether prejudice arising from failure to instruct on a heat of passion manslaughter theory in a non-capital case should be evaluated under the federal constitutional standard set out in *Chapman, supra,* 386 U.S. 18, or the state standard set out in *Watson, supra,* 46 Cal.2d 818. (See *Moye, supra,* 47 Cal.4th at p. 564 (dis. opn. of Kennard, J.); *People v. Lasko* (2000) 23 Cal.4th 101, 113; *People v. Millbrook* (2014) 222 Cal.App.4th 1122, 1145-1146 (*Millbrook*).) We need not resolve this question because the error here is harmless even under the more stringent federal standard. Under this standard, error requires reversal unless it appears beyond a reasonable doubt that it did not contribute to the verdict. (*Chapman, supra,* at p. 24.)

escape – but nonetheless concluded the same conduct provided a basis for negating Taylor-Windsor's intent based on provocation and heat of passion. (See *Moye, supra,* 47 Cal.4th at p. 557 [not likely that jury which rejected appellant's perfect and imperfect self-defense claims would have found legally sufficient provocation existed]; compare *People v. Millbrook, supra,* 222 Cal.App.4th at p. 1148 [distinguishing *Moye* because there was "significant other evidence" supporting heat of passion].) The omission of this instruction did not affect the jury's verdict.

V. No Instruction on Provocation

Taylor-Windsor claims his counsel was ineffective for failing to request CALCRIM No. 522 concerning the negation of premeditation and deliberation by evidence of provocation from the victims.

" '[A] defendant claiming a violation of the federal constitutional right to effective assistance of counsel must satisfy a two-pronged showing: that counsel's performance was deficient, and that the defendant was prejudiced, that is, there is a reasonable probability the outcome would have been different were it not for the deficient performance.' " (*People v. Woodruff* (2018) 5 Cal.5th 697, 736 (*Woodruff*).) "If a defendant has failed to show that the challenged actions of counsel were prejudicial, a reviewing court may reject the claim on that ground without determining whether counsel's performance was deficient." (*People v. Sapp* (2003) 31 Cal.4th 240, 263.) A court will reverse for ineffective assistance of counsel on direct appeal only when "the record on appeal demonstrates there could be no rational tactical purpose for counsel's omissions." (*People v. Lucas* (1995) 12 Cal.4th 415, 442.) "Rarely is ineffective assistance of counsel established on appeal since the record usually sheds no light on counsel's reasons for action or inaction." (*Woodruff, supra,* at p. 736.)

CALCRIM No. 522 provides:

> Provocation may reduce a murder from first degree to second degree [and may reduce a murder to manslaughter]. The weight and significance of the provocation, if any, are for you to decide.
>
> If you conclude that the defendant committed murder but was provoked, consider the provocation in deciding whether the crime was first or second degree murder. [Also, consider the provocation in deciding whether the defendant committed murder or manslaughter.]
>
> [Provocation does not apply to a prosecution under a theory of felony murder.]

Defense counsel may have had tactical reasons for omitting CALCRIM No. 522 from the jury instructions. Taylor-Windsor's primary contention was that he acted in self-defense and therefore was not guilty, or was guilty merely of voluntary manslaughter based on imperfect self-defense. An additional jury instruction on provocation as set forth in CALCRIM No. 522 would have been contrary to that strategy because it would have focused the jury on considering provocation to reach a verdict of second degree murder rather than a verdict of voluntary manslaughter or acquittal. (See *People v. Wader* (1993) 5 Cal.4th 610, 643 [defense counsel could have had a rational tactical purpose for not requesting an instruction that was inconsistent with the defense's theory of the case].) Because we cannot conclude counsel had no rational tactical purpose for this omission, Taylor-Windsor cannot establish ineffective assistance on appeal. (*Woodruff, supra,* 5 Cal.5th at p. 746.)

VI. Insufficient Evidence of Premeditation and Deliberation

Taylor-Windsor contends there was insufficient evidence of premeditation and deliberation to support his conviction for first degree murder. He contends the evidence suggests his conduct was irrational and spontaneous, rather than premeditated and deliberate.

In reviewing the sufficiency of the evidence, " 'we review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a

reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' " (*People v. Cravens* (2012) 53 Cal.4th 500, 507 (*Cravens*).) "We must presume in support of the judgment the existence of every fact that the trier of fact could reasonably deduce from the evidence." (*People v. Medina* (2009) 46 Cal.4th 913, 919.) "The conviction shall stand 'unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction]." ' " (*Cravens*, *supra*, 53 Cal.4th at p. 508.) The standard of review is the same in cases in which a conviction is based primarily on circumstantial evidence. (*People v. Clark* (2016) 63 Cal.4th 522, 625.)

First degree murder involves a killing that is willful, deliberate, and premeditated. (Pen. Code, § 189; *People v. Villegas* (2001) 92 Cal.App.4th 1217, 1223-1224.) "Premeditated" means the defendant thought about or considered the act beforehand. (*People v. Pearson* (2013) 56 Cal.4th 393, 443 (*Pearson*); *People v. Perez* (1992) 2 Cal.4th 1117, 1123 (*Perez*).) "Deliberate" means " 'formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action.' " (*Perez*, at p. 1123.) " 'An intentional killing is premeditated and deliberate if it occurred as the result of preexisting thought and reflection rather than unconsidered or rash impulse.' " (*Pearson*, at p. 443.) Premeditation and deliberation can occur rapidly. (*People v. Cook* (2006) 39 Cal.4th 566, 603-604; *People v. Thomas* (1945) 25 Cal.2d 880, 900 (*Thomas*).) "The true test is not the duration of time as much as it is the extent of the reflection." (*Thomas*, at p. 900.)

Our Supreme Court has explained that planning activity, preexisting motive, and manner of killing may be relevant factors in evaluating the sufficiency of evidence of premeditation and deliberation. (*People v. Anderson* (1968) 70 Cal.2d 15, 26-27.) However, these factors are "neither normative nor exhaustive." (*People v. Halvorsen* (2007) 42 Cal.4th 379, 420.) While they may aid reviewing courts, they do not " 'exclude all other types and combinations of evidence that could support a finding of premeditation and deliberation.' " (*People v. Solomon* (2010) 49 Cal.4th 792, 812.)

We acknowledge the evidence of premeditation and deliberation in this case was not overwhelming. Nonetheless, it is sufficient to support the conviction. Minutes before the stabbing, Taylor-Windsor unsuccessfully attempted to speak with his ex-wife, became sad, then asked Reid, "What would you say to your son in your last e-mail to him?" From this unusual statement, a reasonable juror could infer that Taylor-Windsor planned a violent, fatal encounter. (See *People v. Elliot* (2005) 37 Cal.4th 453, 471; see also *People v. Lee* (2011) 51 Cal.4th 620, 636; *People v. Koontz* (2002) 27 Cal.4th 1041, 1082.) Additionally, the interval between the phone call and the stabbing was sufficient for Taylor-Windsor to deliberate and premeditate the attack. (*People v. Harris* (2008) 43 Cal.4th 1269, 1287 (*Harris*).)

There is also evidence to suggest Taylor-Windsor attacked Jessica and Reid from behind with extreme force, inflicting numerous deep stab wounds to vital parts of their bodies. Taylor-Windsor continued to stab Jessica from behind while she screamed. A reasonable jury could conclude the nature, force, and extent of the attack reflected a calculated and deliberate effort to kill. (See *People v. Brady* (2010) 50 Cal.4th 547, 564; *Harris, supra,* 43 Cal.4th at p. 1287.)

The evidence is sufficient to permit a jury to find beyond a reasonable doubt that the murder was premeditated and deliberate. Accordingly, sufficient evidence supports the conviction for first degree murder.

VII. Cumulative Prejudice

Taylor-Windsor argues the cumulative effect of the trial court's errors compels reversal. Because we find no error, there is no cumulative prejudicial effect to consider. (*People v. Covarrubias* (2016) 1 Cal.5th 838, 910.) We therefore reject this argument.

DISPOSITION

The judgment is affirmed.

_____
SNAUFFER, J.

WE CONCUR:

_____
LEVY, Acting P.J.

_____
POOCHIGIAN, J.